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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT GUTIERREZ, Defendant and Appellant.	B300346 (Los Angeles County Super. Ct. No. BA359036)

APPEAL from an order of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Reversed and remanded with directions.

Law Office of Charles Carbone, Charles F.A. Carbone and Rebecca N. Rabkin for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Amanda V. Lopez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

In 2011, defendant and appellant Robert Gutierrez was convicted of second degree murder. (Pen. Code, § 187)[1] He was sentenced to 40 years to life in state prison. Defendant appealed his conviction, and on October 3, 2012, we affirmed the judgment. (*People v. Gutierrez* (Oct. 3, 2012), B233166 [nonpub. opn.], p. 2 (*Gutierrez I*).)

On September 30, 2018, the Governor signed Senate Bill No. 1437 (2018 Reg. Sess.) (S.B. 1437) in order to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Effective January 1, 2019, S.B. 1437 added section 1170.95, creating a procedure whereby a person whose murder conviction is final, but who could not now be convicted based on S.B. 1437's amendments to sections 188 and 189, can petition to have the murder conviction vacated and to be resentenced. (Stats. 2018, ch. 1015, §§ 2-4.)

On February 11, 2019, defendant filed a petition for resentencing under section 1170.95, arguing that he was entitled to relief because he was convicted of second degree murder pursuant to the natural and probable consequences theory, as an aider and abettor of an assault, and could not be convicted of murder under the newly amended sections 188 and 189. The trial court denied the petition.

Defendant timely filed a notice of appeal. He argues that because he set forth a prima facie case for relief, he is entitled to

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

an order to show cause and an evidentiary hearing, at which the prosecution will bear the burden of proof, to determine whether he is entitled to have his sentence vacated and be resentenced. The People agree, stating in their respondent's brief: "Where, as here, a petitioner has averred facts, which if true, render him eligible for resentencing, and the record does not indisputably show he is ineligible as a matter of law, the trial court must issue an order to show cause and hold a hearing to determine whether the murder conviction should be vacated."

In accordance with the parties' briefs, we reverse and remand for the trial court to issue an order to show cause and to hold a hearing pursuant to section 1170.95, subdivision (d).

FACTUAL BACKGROUND

"On June 20, 2008, near midnight, Leonardo Reyes (Leonardo) and his two sons, nine-year-old Leonardo, Jr., (Junior) and 11-year-old Rudy (Rudy), took a walk in the area of 1750 South Westmoreland, in the City of Los Angeles. As they were walking, [defendant], whom Rudy and Junior knew from the neighborhood as 'Info,' came out of an alley across the street and approached them, asking Leonardo where he was from. Leonardo and his sons kept walking and did not answer.

"[Defendant] had a knife in his hand which he put into his pocket. He punched Leonardo in the back, and a fight ensued. Junior thought that Leonardo was winning. A few minutes into the fight, a second unidentified man (unidentified man), wearing a blue shirt, exited the same alley as [defendant] had, crossed the street, and joined the fight against Leonardo. It appeared to Rudy that the man 'ran and he helped . . . his friend.' [Defendant] and the man continued hitting Leonardo for a couple of minutes. [Defendant] then disengaged from the fight,

approached the boys and kicked Rudy, who landed on his head. [Defendant] laughed and rejoined the fight.

"At some point, the unidentified man told [defendant] to step aside. [Defendant] complied, the unidentified man moved closer to Leonardo, took a gun from his waist area and shot Leonardo. He told [defendant], 'Let's get out of here.' They ran together back to the same alley from which they had come.

"Leonardo died from a single gunshot wound to the chest." (*Gutierrez I*, *supra*, B233166, at pp. 2–3.)

PROCEDURAL BACKGROUND

I. *Defendant's conviction*

In a single-count information filed by the Los Angeles County District Attorney's Office, defendant was charged with murder (§ 187, subd. (a)). The information also alleged that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C), and that a principal used a firearm within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e)(1).

At trial, as is relevant to the issues raised in this appeal, the jury was instructed that, in order "[t]o prove that the defendant is guilty of murder," the People were required to prove that "the defendant is guilty of an assault; [¶] during the commission of the assault, a coparticipant in that assault, committed the crime of murder; and, [¶] . . . under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault."

The jury found defendant guilty of second degree murder and found true the firearm and gang allegations.

II. *Defendant's section 1170.95 petition*

In February 2019, defendant, represented by counsel, filed a petition to vacate his murder conviction and to be resentenced pursuant to section 1170.95. In his supporting declaration, defendant averred that he was eligible for relief because (1) an information was filed against him allowing the prosecution to proceed under a natural and probable consequences theory of murder; (2) he was convicted of second degree murder following trial; and (3) he could not now be convicted of murder under recent amendments to sections 188 and 189.

The People opposed the petition, arguing that section 1170.95 is unconstitutional and that defendant was not entitled to relief because he "was a major participant in the crime."

III. *Trial court's order denying defendant's petition*

At the hearing on whether defendant had made a prima facie showing that he was entitled to relief under section 1170.95, the trial court stated that it was inclined to deny defendant's petition. First, the trial court found section 1170.95 unconstitutional. Second, the court found that defendant "was a full participant with full and complete reckless disregard for human life."

After entertaining oral argument, the trial court denied the petition. The minute order provides: "The court denies the petition on the basis that [defendant] was a major participant, and he acted with reckless indifference to human life."

DISCUSSION

On appeal, defendant argues that the trial court erred in finding section 1170.95 unconstitutional and in finding that he

had failed to make a prima facie case for relief. Our review is de novo. (See *Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1018 [application of law to undisputed facts]; *Stennett v. Miller* (2019) 34 Cal.App.5th 284, 290 [statutory interpretation and constitutionality].)

I. *Constitutionality*

Before we turn to the merits of defendant's section 1170.95 petition, we first consider whether the trial court erred in finding the statute is unconstitutional. To the extent the trial court denied defendant's petition on the grounds that section 1170.95 is unconstitutional, we conclude that the trial court erred. (See, e.g., *People v. Bucio* (2020) 48 Cal.App.5th 300, 306; *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 250–251; *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 279–289.)

II. *Relevant Law*

Section 1170.95 provides a mechanism whereby people "who believe they were convicted of murder for an act that no longer qualifies as murder following the crime's redefinition in 2019[] may seek vacatur of their murder conviction and resentencing by filing a petition in the trial court." (*People v. Drayton* (2020) 47 Cal.App.5th 965, 973 (*Drayton*).)

In order to obtain S.B. 1437 resentencing relief, the petitioner must proceed sequentially through section 1170.95's separate steps. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1140 (*Lewis*), review granted Mar. 18, 2020, S260598; see also *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1477 [sequential structure of a statutory scheme supports interpretation that acts required by the statutes occur in the same sequence].) First, a defendant must file a facially sufficient section 1170.95 petition. The petitioner must

aver that he is eligible for relief because (1) an accusatory pleading was filed against him allowing the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; (2) he was convicted of first or second degree murder; and (3) he could not be convicted of murder as a result of the recent amendments to sections 188 and 189. (§ 1170.95, subds. (a)(1)-(3), (b)(1)(A).)

The trial court must immediately review the petition and, if the petitioner is ineligible for resentencing as a matter of law because of some disqualifying factor, the trial court must dismiss or deny the petition. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328–333 (*Verdugo*), review granted Mar. 18, 2020, S260493; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 57–58 (*Cornelius*), review granted Mar. 18, 2020, S260410; *Lewis*, *supra*, 43 Cal.App.5th at p. 1140.)[2]

However, if the petition is facially sufficient, the petitioner is entitled to the appointment of counsel, if requested, and the People may then brief the question of whether the petitioner is entitled to relief. (§ 1170.95, subd. (c); *Lewis*, *supra*, 43 Cal.App.5th at pp. 1139–1140; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 331–332.) In contrast to the first step showing, the trial court makes the second step determination with the benefit of briefing and analysis by both parties, thereby permitting the trial court to undertake more informed analysis concerning a petitioner's

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[2] Disqualifying factors, or factors indicating ineligibility, include, for example, a petitioner who admitted to being the actual killer (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 329–330) or a petitioner that the jury found was the actual killer (*Cornelius*, *supra*, 44 Cal.App.5th at p. 58). (See also *Lewis*, *supra*, 43 Cal.App.5th at pp. 1138, 1140.)

"entitle[ment] to relief," relief meaning an evidentiary hearing, not necessarily entitlement to resentencing. (§ 1170.95, subd. (c); *Drayton*, *supra*, 47 Cal.App.5th at p. 975.)[3] When making this determination, "the trial court should assume all facts stated in the section 1170.95 petition are true. [Citation.] The trial court should not evaluate the credibility of the petition's assertions, but it need not credit factual assertions that are untrue as a matter of law . . . . [I]f the record 'contain[s] facts refuting the allegations made in the petition . . . the court is justified in making a credibility determination adverse to the petitioner.' [Citation.] However, this authority to make determinations without conducting an evidentiary hearing . . . is limited to readily ascertainable facts from the record (such as the crime of conviction), rather than factfinding involving the weighing of evidence or the exercise of discretion (such as determining whether the petitioner showed reckless indifference to human life in the commission of the crime)." (*Drayton*, *supra*, at p. 980; see also *Lewis*, *supra*, 43 Cal.App.5th at p. 1138 [the contents of the record of conviction defeats a petitioner's prima facie showing only when the record "show[s] as a matter of law that the petitioner is not eligible for relief"].)

If the trial court determines that the petitioner has made a prima facie showing of entitlement to relief, it must issue an order to show cause. (§ 1170.95, subd. (c).) "[U]nless the parties

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[3] Although the same type of information from the record of conviction could result in denial of a petition at either prima facie step, the two steps are procedurally distinct and should not be read as a redundancy written into the statute. The statute contemplates two separate determinations that the trial court must make at different times during the petition procedure. (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 328–329.)

waive the hearing or the petitioner's entitlement to relief is established as a matter of law by the record[,]" the trial court then holds a hearing at which "the burden of proof . . . shift[s] to the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." (*Drayton*, *supra*, 47 Cal.App.5th at p. 981; see also § 1170.95, subd. (d)(1)-(3).)

III. *Defendant is entitled to an order to show cause hearing*

As the parties agree, defendant made a prima facie showing of eligibility. After all, he filed a section 1170.95 petition averring that (1) an information had been filed against him allowing the prosecution to proceed under a theory of murder under the natural and probable consequences doctrine; (2) he was convicted of second degree murder; and (3) he could not now be convicted of murder following the amendments to sections 188 and 189. And, after an examination of the record and briefing by both parties, there was no evidence to indisputably show that, as a matter of law, defendant was ineligible or not entitled to relief. Because defendant satisfied the prima facie stages of section 1170.95, subdivision (c), the trial court was required to set the matter for an order to show cause, with an evidentiary hearing.

The trial court denied defendant's petition on the grounds that defendant was a major participant in the crime and acted with reckless indifference to human life. But that finding had not been indisputably established such that defendant would be disqualified for relief at the prima facie stage.

To the extent the trial court's comment could be construed as a finding that he was a direct aider and abettor to the murder, that finding also could not occur at the prima facie stage. After all, there is no conclusive evidence that defendant was convicted of second degree murder on the principle of direct aiding and

abetting, which requires proof of an intent to kill, rather than the natural and probable consequences theory. In fact, in *Gutierrez I*, we specifically noted that defendant "was convicted of second degree murder as an aider and abettor of an assault, of which the murder was the natural and probable consequence." (*Gutierrez I*, *supra*, B233166, at p. 4.) We do not know if defendant possessed the requisite malice to be convicted of murder. (§ 189, subd. (e)(2).)

Moreover, we do not know if the jury was instructed on the principle of direct aiding and abetting. We also do not know if the jury was instructed on the requirement of intent. But we do know that the jury was instructed that murder was a natural and probable consequence of assault.

Thus, for the trial court to have concluded that defendant was a direct aider and abettor, it would have had to engage in some sort of "factfinding involving the weighing of evidence or the exercise of discretion." (*Drayton*, *supra*, 47 Cal.App.5th at p. 980.) That is not permitted at the prima facie stage of the proceedings. (*Ibid*.) Rather, an evidentiary hearing—where the People bear the burden of proof beyond a reasonable doubt—is required.[4]

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[4] As the People point out in their respondent's brief, "[b]ecause section 1170.95, subdivision (d)(3), permits the parties to present new evidence to meet their respective burdens at the evidentiary hearing, the prosecutor could present evidence that [defendant] was a major participant who acted with reckless disregard to human life while committing an enumerated offense." Alternatively, following a hearing, the trial court could deny defendant's petition "on the basis that [defendant] was a direct aider and abettor to the murder."

In so holding, "[w]e express no opinion about [defendant's] ultimate entitlement to relief following the hearing. (§ 1170.95, subd. (d)(2).)" (*Drayton*, *supra*, 47 Cal.App.5th at p. 983.)

DISPOSITION

The order denying defendant's section 1170.95 petition is reversed. On remand, the trial court is directed to issue an order to show cause (§ 1170.95, subd. (c)) and to hold a hearing to determine whether to vacate defendant's murder conviction and resentence him (§ 1170.95, subd. (d)).

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT